

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE

COMMONWEALTH OF VIRGINIA,

v.

CASE NOS: CR03-3089, CR03-3090, CR03-3091  
Hon. Jane Marum Roush

LEE BOYD MALVO,

Defendant

**NOTICE**

To: Robert F. Horan, Jr., Esquire  
Commonwealth's Attorney  
Raymond F. Morrogh, Esquire  
Deputy Commonwealth's Attorney  
4110 Chain Bridge Road  
Room 123  
Fairfax, VA 22030

PLEASE TAKE NOTICE that I shall appear, by counsel, on September 17, 2003 at 10:00 A.M. before the Hon. Jane Marum Roush, Judge of the Fairfax Circuit Court, to urge my Motion to Preclude the Commonwealth from Seeking the Death Penalty Where the Defendant Was a Juvenile at the Time of the Offense Because Execution of Juveniles Violates International Law and American Treaty Commitments.

Respectfully submitted,

**LEE BOYD MALVO**

By \_\_\_\_\_  
Co-Counsel

and

By \_\_\_\_\_  
Co-Counsel

Michael S. Arif, Esquire  
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8001 Braddock Road  
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703-323-1200  
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P. O. Box 7268  
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804-358-2328  
804-358-3947(Fax)  
VSB No: 16593

CERTIFICATE OF SERVICE

We/I hereby certify that a true copy of the foregoing Motion/Memorandum was mailed,  
first class mail to:

Robert F. Horan, Jr., Esquire  
Commonwealth's Attorney  
4110 Chain Bridge Road  
Room 123  
Fairfax, VA 22030

and the original was forwarded for filing to:

Hon. John T. Frey  
Clerk  
Fairfax County Circuit Court  
Fairfax County Judicial Center  
4110 Chain Bridge Road  
Fairfax, VA 22030-4009

and a true copy was forwarded to the

Hon. Jane Marum Roush  
Judge  
Fairfax County Circuit Court  
Fairfax County Judicial Center  
4110 Chain Bridge Road  
Fairfax, VA 22030-4009

this 28<sup>th</sup> day of August, 2003.

\_\_\_\_\_  
Co-Counsel

\_\_\_\_\_  
Co-Counsel

Filed in the Clerk's Office  
the 29 day of August, 2003  
TESTE: LILLIE M. HART, CLERK  
By [Signature] D.C.

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LEE BOYD MALVO,

Defendant

**MOTION TO PRECLUDE THE COMMONWEALTH  
FROM SEEKING THE DEATH PENALTY WHERE THE  
DEFENDANT WAS A JUVENILE AT THE TIME OF THE OFFENSE  
BECAUSE EXECUTION OF JUVENILES VIOLATES  
INTERNATIONAL LAW AND AMERICAN TREATY COMMITMENTS**

TO THE HONORABLE JANE ROUSH, JUDGE:

COMES NOW the defendant, Lee Boyd Malvo, by his co-counsels, and respectfully  
states as follows:

**I. TREATY OBLIGATIONS**

1. Pursuant to Article VI, Section 2, the Supremacy Clause of the United States Constitution, “[a]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Law of any State to the contrary notwithstanding.”

2. The United States has ratified and/or signed certain international treaties and conventions and thereby bound itself to abide by their provisions. Those treaties thereby became the Supreme Law of the land and are binding upon the judges of Virginia as well as all her sister States.

3. Each of those treaties has certain “core principles” which are also referred to as “nonderogable norms”.

4. Under international law, a country (referred to as a “member state”) which is joining in a treaty may ratify or join into the treaty with a “reservation.” That is, the member state chooses to exclude itself from agreeing to a particular provision of the treaty.

5. However, under international law, a member state may not make a valid reservation to a “core principle” of the treaty (therefore the term, “nonderogable norm”). As to core principles, treaty endorsement or ratification requires and means full acceptance and adherence. Any purported “reservation” against a core issue is deemed invalid and void.

6. A “reservation” as to a core principle/nonderogable norm would be analogous to one of the States of the United States joining the Union or stating it will remain in the Union with a “reservation” to some or all of the Bill of Rights. Clearly each U.S. State may make laws that differ from other U.S. States, but as to a core principle (i.e. constitutional principles) any effort at a “reservation” would be invalid and given no effect or recognition by the other States.

7. The United States has ratified the International Covenant on Civil and Political Rights. One of its nonderogable norms is the prohibition of execution of persons who were juveniles at the time of the offense. The United States Senate attempted to make a reservation to this core principle barring juvenile executions. That attempted reservation is invalid.

8. The United States has ratified the Fourth Geneva Convention without any reservations. The United States has signed in the American Convention on Human Rights, the Convention on the Rights of the Child, and ratified the Inter-American Commission on Human Rights of the Organization of American States (OAS). It did not file any reservation or object to any norm in any of those.

9. Each of those treaties or international agreements has as a core principle/non-derogable norm the absolute prohibition of executing persons who were under the age of 18 at the time of their offense.

10. In addition the United States has ratified and signed the Vienna Convention on the Law of Treaties which sets forth the manner in which all international treaties shall be interpreted and disputes as to reservations resolved.

## II. JUS COGENS

11. The international community has established certain jus cogens norms which are defined as:

a superior order of legal norms derived from fundamental values held by the international community the breach of which shock the conscience of humankind and bind the international community as a whole, irrespective of protest, recognition or acquiescence.

12. Those jus cogens norms include the prohibition of torture, piracy, genocide, slave trade, slavery and execution of persons who were under the age of 18 years at the time of their crime.

13. The United States as a member of the global community must conform to jus cogens norms or lose credibility with its world partners.

14. The United States Supreme Court has recently recognized the importance of international law in interpreting United States constitutional issues and recognizing evolving norms. See Lawrence and Garner v. Texas, 123 S. Ct 2472, 2481, 2483, 156 L.Ed.2d 508, 522, 524 (2003) and Atkins v. Virginia, 122 S.Ct. 2242 (2002).


15. Lee Boyd Malvo was 17 years old at the date of the alleged offenses.

16. Virginia is bound by both the treaty provisions entered into by the United States and the principle of jus cogens. As such, imposition of the death penalty upon Lee Malvo is barred.

WHEREFORE, the defendant, Lee Malvo, by his co-counsels, respectfully moves this honorable Court to enter an Order prohibiting the Commonwealth from seeking the death penalty for the defendant.

Respectfully submitted,

**LEE BOYD MALVO**

By  \_\_\_\_\_  
Co-Counsel

and

By \_\_\_\_\_  
Co-Counsel

Michael S. Arif, Esquire  
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this 28<sup>th</sup> day of August, 2003.

\_\_\_\_\_  
Co-Counsel